IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 385 OF 2003
WITH
CIVIL APPLICATION NO. 1 OF 2004

Malkari Ganpat Waghmare ..Appellant
(Org.Deft.No.1)

Vs.

1. Tippanna Jetinga Gaikwad
and anr. ..Respondents

Mr. A.A. Kumbhakoni with Mr.A.M. Kulkarni for appellant.
Mr. S.V. Sakhare for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : April 24, 2007.

P.C.:

1. Heard Mr. Kumbhakoni with Mr. Kulkarni the learned counsel for the appellant- original defendant no.1 and Mr. Sakhare appears for the respondent no.1- original plaintiff.

2. The plaintiff and defendant no.2 are brothers and the defendant no.1 claims to have purchased the

entire agricultural land located in Gat No.561, admeasuring about 8 Hectors. Undoubtedly, both the brothers were entitled for equal share in the said land and it was the case of the plaintiff that his father late Jetinga Gaikwad had partitioned the land and 9 acres and 36 gunthas from the Eastern Side was given to his share, whereas the remaining land in the said gat number had gone to the share of defendant no.2 and it was purchased by defendant no.1. The suit was filed for perpetual injunction and subsequently by way of amendment an alternative prayer was made for recovery of possession of the suit land admeasuring 9 acres and 36 gunthas from Gat No.561 of village Hotagi in Solapur District.

3. The defendant no.1 filed Written Statement at Exh. 13 and opposed the suit contending that he was in possession of the suit land right from 1963 as owner and he has perfected his title by adverse possession. He also filed additional Written Statement at Exh.41 claiming that on 3/4/1963 the father of the plaintiff had agreed to sale the suit land to him and, therefore, he was in possession of

the suit land by way of part performance of the agreement for sale. As per him, the land was agreed to be sold for a sum of Rs.2000/- and Rs.250/- were paid to the plaintiff's father till the agreement for sale was signed on 3/4/1963 and the remaining amount of Rs.1750/- was to be paid at the time of execution of the sale deed. He further submitted that within the stipulated time of 11 months the balance amount of Rs.1750/- was paid to the plaintiff's father but the sale deed was not signed. Consequently, the defendant no.1 filed a counter claim for specific performance (Exh.41). The plaintiff filed his Written Statement to the counter claim at Exh.46 and opposed the counter claim.

4. Two admitted facts are required to be noted and they are, that the total land in Gat No.561 admeasure 8 H. and 5 R. and 10 acres from the same gat number and located on the Western Side was sold by the plaintiff's father to defendant no.1. The defendant no.1 did not deny that the plaintiff's father was the owner of the entire suit property. Both the courts below have concurrently held that 10

acres of land was sold by the plaintiff's father as per sale deed Exh.75. The agreement for sale at Exh.74 and dated 3/4/1963 was also proved on the basis of the evidence of bond writer D.W.3. Revenue extract at Exh.89 and 7x12 extract that was placed before the trial court pertain to the period from 1971-72 onwards and till 1987-88. The trial court, therefore, held that the defendant no.1 proved his possession of the suit land from the year 1971-72 till 1987-88. The important question that was required to be considered was, whether the defendant no.1 was put in possession of the suit land by way of part performance of the agreement for sae dated 3/4/1963 so as to claim the perfection of his title for bringing his case within the ambit of Section 53A of the Transfer of Property Act. The document at Exh.74 spoke for itself. Both the courts have recorded a concurrent finding on this issue, namely, that initially it was stated in the said document that the possession was handed over to the defendant no.1 on the same day, but subsequently the said statement has been erased and it was re-written to the effect that the possession would be handed over at the time of the execution of the sale

deed. The bond writer in his depositions admitted that the earlier statement was erased with the consent of both the parties and it was agreed that the possession would be handed over at the time of the execution of the sale deed. The sale deed was never executed and though the defendant no.1 in his deposition stated that he had reminded the plaintiff's father for signing the sale deed, there was no documentary evidence that such efforts were made and that the balance amount of Rs.1750/- was paid to the plaintiff's father any time before 1971. There was no documentary proof in support of the oral deposition of the defendant no.1 that the said amount of Rs.1750/- was paid to the plaintiff's father. It was under these circumstances, the Lower Appellate Court held that the defendant no.1' possession over the suit land was not by way of part performance of the agreement for sale and, in fact, there was no evidence on record that he was in possession of the suit land from 3/4/1963 till the year 1971. It was, therefore, the view taken by the Lower Appellate Court that the claim of defendant no.1 by way of counter claim for specific performance was hit by limitation. No fault could be

found with this view taken by the Lower Appellate Court and reversing the view taken by the trial court.

5. Mr. Kumbhakoni the learned counsel relied upon the judgment in the case of Shrimant Shamrao Suryavanshi and anr. vs. Pralhad Bhairoba Suryavanshi (Dead) by LRs. and ors. **[(2002) 3 SCC 676]**. In the said case the question that fell for consideration by the Apex Court was,

> "Whether in a suit brought by a transferor for recovery of possession of the suit property, a defendant transferee can defend or protect his possession over the suit property obtained in pursuance of a part performance on an agreement to sell under Section 53-A of the Transfer of Property Act (hereinafter referred to as "the Act"), even if a suit for specific performance of an agreement to sell is barred by limitation.?

. In the instant case the Lower Appellate Court has held and rightly so that the defendant no.1 could

not prove that he had come in possession of the suit land by way of part performance of the agreement for sale dated 3/4/1963. Hence the judgment in the case of Shrimant Suryavanshi (Supra) is not applicable.

6. In these obtaining circumstances, this second appeal does not raise any substantial question of law for the consideration of this court and, therefore, the appeal must fail at the threshold.

7. The appeal is hereby dismissed.

8. Civil Application No. 1 of 2004 does not survive and the same shall stand disposed as such. Ad-interim order stands vacated.

(B.H. Marlapalle,J.)